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October 3, 2006

Mary L. Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station  
Boston, MA 02110

Re: Bay State Gas Company, D.T.E. 06-31

Dear Ms. Cottrell:

Enclosed for filing please find Opposition of Bay State Gas Company to Local 273's Motion for Finding of Contempt and Sanctions.

Please do not hesitate to telephone me or Patricia M. French, 508-836-7394, with any questions.

Very truly yours,

Robert L. Dewees, Jr.

RLD/tlm  
Enclosure

cc: Caroline Bulger, Esq., Hearing Officer  
Service List

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Investigation by the Department  
of Telecommunications and Energy  
regarding Bay State Gas Company's  
compliance with G.L. c. 164, § 1E  
and other staffing matters pursuant to  
D.T.E. 05-27 (2005).

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D.T.E. 06-31

**OPPOSITION OF BAY STATE GAS COMPANY TO LOCAL 273  
MOTION FOR FINDING OF CONTEMPT AND SANCTIONS**

On September 25, 2006, Local 273 of the Utility Workers Union of America ("Local 273") filed a Motion requesting that the Department find Bay State Gas Company ("Bay State" or the "Company") in contempt for its failure to provide an answer to information request UWUA 1-8, modified by the Hearing Officer's order at the September 7, 2006 discovery conference, and to impose sanctions. The sanctions sought by Local 273 are (1) the striking the testimony of Stephen H. Bryant, President of Bay State, (2) the postponing the due date for intervener testimony until two weeks after compliance with the Hearing Officer's bench request, and (3) reimbursement by Bay State of Local 273's expenses of bringing the instant Motion for Sanctions and those associated with an in-conference motion to compel on September 7, 2006. Local 273 Motion, p. 4.

Bay State opposes Local 273's Motion.<sup>1</sup>

**I. LOCAL 273's MOTION IS UNSUPPORTED BY LAW; ITS REQUESTED SANCTIONS ARE UNWARRANTED AND INAPPROPRIATE.**

**A. Bay State objected to UWUA 1-8, upon which Local 273 bases its motion, and the objection was upheld by the Hearing Officer.**

In UWUA 1-8, Local 273 sought internal communications throughout NiSource concerning the November 4, 2005 Senate Post-Audit and Oversight Committee hearing held by Senator Marc Pacheco of Taunton. Bay State objected to UWUA 1-8 on the grounds that it sought information irrelevant to this proceeding, because the legislative hearing concerned the Department's oversight of Bay State. At a discovery conference held on September 7, 2006 in this proceeding, Local 273 moved to compel a response to UWUA 1-8. The Hearing Officer heard argument on the motion and denied Local 273's motion. In an effort to resolve Local 273's continuing discovery concerns, the Hearing Officer ordered Bay State to produce communications between Company employees concerning service quality, staffing levels and the relationship between NiSource and Bay State for the year 2005. Tr. 9/7/06, p. 10-11, 14. This was a different and considerably broader request than UWUA 1-8. The fact that UWUA 1-8 was not responded to is not a basis for a request for sanctions. Local 273 was overruled in its attempt to compel Bay State to answer UWUA 1-8, regarding the Pacheco Hearings at the Post-Audit Oversight Committee.

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<sup>1</sup> Before filing this Opposition, Bay State spoke with counsel for Local 273 to ascertain whether he would withdraw this Motion, given that the Hearing Officer granted additional time on September 27 for the filing of intervenor testimony. However, Counsel for Local 273 decided to pursue the Motion.

**B. Bay State responded to the Hearing Officer's Bench Request (identified as DTE-BSG (9/7/06)) in a reasonable period, given the breadth and expanse of the request. Therefore, there was no egregious conduct by Bay State that warrants the imposition of sanctions.**

After the September 7 discovery conference, Bay State and Local 273 had discussions about resolving the dispute over UWUA 1-8. Tr. 9/27/06, p. 20. On September 25, the Company indicated it was responding to the Hearing Officer's request, and on September 26 and 27, it delivered bulk supplemental responses to the request. The Company's response on September 25 was eleven days after the due date.

A delay of eleven days in responding to the Hearing Officer's request does not rise to the level of contempt or justify the imposition of sanctions, particularly in a proceeding such as this where there is no statutory deadline for a Department order. Moreover, Local 273 is unable to claim that Bay State's filing out-of-time prejudiced Local 273, because significant additional time was granted to Local 273 to file its intervenor testimony. Moreover, for a portion of the period that Bay State's response was delayed, Local 273 and Bay State were engaged in discussions in an attempt to resolve the discovery needs of Local 273, a practice encouraged by the Department and the Hearing Officer.

The Department imposes sanctions with respect to delays in producing discovery on an infrequent basis and if then, only for the most egregious offenses. Riverside Steam & Electric Company, D.P.U. 88-123, Hearing Officer Ruling on Motion to Compel Discovery, March 6, 1989 (Hearing Officer order does not impose sanctions although sanctions were requested); Verizon New England, Inc., D.T.E. 01-20, Interlocutory Order

on AT&T's Motion for Relief, October 18, 2001 (Department denies motions to strike evidence of AT&T and Verizon).

In addition, under the Massachusetts Rules of Civil Procedure, sanctions are imposed only upon evidence of extreme and egregious behavior in which a party has habitually failed to comply with numerous discovery orders issued by a Court over an extended period of time. Harmon Plumbing v. Jacobs, 1994 Mass. App. Div. 89 (affirming dismissal of action and exclusion of documents after two court orders); RSR Company, Inc. v. Union Grill, Inc., 17 Mass. L. Rep. 739 (2003) (holding plaintiff entitled to recover fees and costs incurred in order to compel production of documents after the defendants failed to comply with two prior court orders); Clamp-All Corporation v. Foresta, 53 Mass. App. Ct. 795, 806 (2002) (default judgment against plaintiff proper where actions demonstrating "failure to comply . . . were not isolated or temporary . . . [but] persistent and flagrant and continued even after a prior default had been removed"); Greenleaf v. Massachusetts Bay Transportation Authority, 22 Mass. App. Ct. 426, 430 (1986) (defendant's default judgment affirmed after it had failed to respond or fully respond to discovery requests for twenty (20) months).

Bay State's response in this proceeding, while delayed, is not egregious conduct. This is clear by analysis of applicable case law. Bay State's filing of DTE-BSG-(9/7/06) was simply eleven days out of time, and this included a period of continuing dialogue with Local 273. Local 273's claim that Bay State treated its discovery obligation in a manner consistent with that which warrants the imposition of sanctions under the laws of the Commonwealth has no basis and should be dismissed.

**C. Local 273's proposed sanctions overreach and are plainly inappropriate.**

Although Local 273 proposes as a sanction that the prefiled direct testimony of Stephen H. Bryant, President of Bay State, be stricken, Mr. Bryant's testimony was a requirement of the Department's Order opening this investigation. Order Opening Investigation, D.T.E. 06-31 (March 24, 2006) ("Order"). In that Order, the Department sought testimony addressing the issues which are the subject of this proceeding. It is wrong for Local 273 to suggest that a filing made pursuant to Department Order is appropriately stricken, even if sanctions could be demonstrated to be warranted.

Local 273 also suggests as a sanction that the due date for intervenor testimony in this proceeding be postponed for two weeks until after the Company complies with the Hearing Officer's order. At the discovery conference held on September 27, the Company recommended an extension of the due date for intervenor testimony by two weeks, which was approved by the Hearing Officer. Tr. 9/27/06, p. 23. Therefore, Local 273's request that additional time be granted is moot. Moreover, the time for Bay State to propound discovery on intervenor testimony has been significantly reduced.

Finally, Local 273 claims as appropriate that the Department order the Company to pay UWUA's expenses in bringing the instant Motion for Sanctions and the costs for its failed September 7 Motion to Compel a response to UWUA 1-8. However, this purported sanction is not supported by the facts.

The September 7 discovery conference was the first time Local 273 moved to compel a response to UWUA 1-8, and therefore, there is no basis to penalize the Company for not responding until the Motion to Compel was heard and decided. In point of fact, the Hearing Officer denied Local 273's Motion to Compel. Therefore, no


sanctions against Bay State can be assessed on Local 273 counsel's efforts in pursuing a denied motion.

After the motion was decided, the Company responded to the Hearing Officer's request, which was much broader than UWUA 1-8, within eleven days of the due date for the response. While the response was not within the Hearing Officer's deadline, because of the number of e-mail searches required, reviews of hundreds and hundreds of documents, and the attendant complexity involved in creating the response, the nominal delay does not rise to the level that justifies the imposition of sanctions or costs. As the cases above indicate, Massachusetts courts have imposed sanctions only in cases of egregious failure to produce discovery, accompanied by a persistent disregard by the offending party to the orders of the Court. Such is not the case here.

## **II. CONCLUSION**

For the foregoing reasons, Bay State opposes the Motion of Local 273 for Sanctions against Bay State Gas Company and asks that the Department of Telecommunications and Energy deny and dismiss the same.

Respectfully submitted,  
BAY STATE GAS COMPANY  
By its Attorneys,

  
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Dated: October 3, 2006



### **CERTIFICATE OF SERVICE**

I certify that I served today a copy of the attached Opposition of Bay State Gas Company to Local 273's Motion for Contempt and Sanctions by hand delivery, first class mail, postage prepaid or electronically on the Department of Telecommunications and Energy and all parties on the service list on file with the Secretary of the Department of Telecommunications and Energy for this proceeding.

Dated at Boston, Massachusetts this 3<sup>rd</sup> day of October, 2006.

Robert L. Deemer, Jr.